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No. 00-1260

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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UNITED STATES of America, *Petitioner,*

v.

MARK JAMES KNIGHTS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF GRANT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant's agreement to a condition of probation that authorizes any law enforcement officer to search his person and residence without a warrant, and without individualized suspicion, authorizes a search by a law enforcement officer investigating criminal activity.

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INTEREST OF AMICUS CURIAE

The People of the State of California have a substantial interest in the apprehension of criminals and in the accuracy and reliability of decisions by their state's highest court. Yet, in *Knights*, the Ninth Circuit directly contradicted long-standing California Supreme Court case law, and presented California's 90,000 sworn peace officers with a Hobson's choice. Because of *Knights*, officers must now either (1) abandon the effective and oft-used tactic of relying on a probationer's search condition to conduct a warrantless search as part of an ongoing criminal investigation, or (2) face the prospect of civil rights litigation and liability for a violation of the Fourth Amendment.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals has erroneously interpreted the Fourth Amendment by ruling that the warrantless search of a state probationer's residence or other property by state officers, based upon a state probation condition permitting such searches by "any law enforcement officer," is nevertheless unreasonable and therefore unconstitutional if it is undertaken for the purpose of "criminal investigation." This ruling not only directly contradicts the California Supreme Court, but also raises an important question of federal law that has not been, but should be, settled by this Court. U.S. Supreme Ct. R. 10(a), 10(c).

THE NINTH CIRCUIT ERRED IN FINDING A VIOLATION OF THE FOURTH AMENDMENT WHERE STATE OFFICERS SEARCHED RESPONDENT'S RESIDENCE, AS PART OF AN ONGOING CRIMINAL INVESTIGATION, IN RELIANCE UPON CONSENT HE HAD GIVEN AS A CONDITION OF PROBATION

For the past 14 years, the California Supreme Court has consistently ruled that when a state probationer consents, as a condition of his probation, to the search of his person, residence, vehicle and other property, by any law enforcement officer, with or without a search warrant or probable cause, a warrantless search of such areas may be undertaken constitutionally without regard to whether "reasonable suspicion" exists, and without regard to the searching officers' subjective motive or purpose. *People v. Bravo*, 43 Cal.3d 600, 605-611 (1987), cert. denied, 485 U.S. 904 (1988); *People v. Woods*, 21 Cal.4th 668, 677-681 (1999), cert. denied, 529 U.S. 1023 (2000).

In stark contrast, the Ninth Circuit Court of Appeals has consistently ruled, for an even longer period of time, that such a search is *un*constitutional unless (1) it is supported by at least "reasonable suspicion" *and* (2) it is undertaken to advance the goals of probation, the primary one of which is rehabilitation, rather than in furtherance of a "criminal investigation."[1] See, e.g., *United States v. Ooley*, 116 F.3d 370

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1. In the *Knights* case, since the searching officers had reasonable suspicion, if not probable cause, at the time they undertook the search, the only point of contention was their purpose.

(9th Cir. 1997), cert. denied 524 U.S. 963 (1998), and cases cited therein.

Thus, as happened in *Knights*, when state officers who are investigating a case undertake a warrantless search of their suspect's/probationer's residence or property in furtherance of their investigation, and without contacting or consulting with the suspect's probation officer or other probation department personnel, the Ninth Circuit will consider the search to be an unconstitutional "subterfuge" for a warrantless search, something which is clearly *outside* the scope of the probationer's consent.[2/] In the court's own words, the probationer's consent "must be seen as limited to *probation* searches, and must stop short of *investigation* searches."[3/] *Knights*, at p. 1142; emphasis added.

As for the glaring conflict between the Ninth Circuit's contrived and needlessly restrictive view and the California Supreme Court's broader and more reasonable view, the Ninth Circuit tersely noted in *Knights* that "that court does not control our reading of federal constitutional law." *Id.*, at p. 1144. It found the California Supreme Court's contrary analysis to be "unpersuasive" and observed: "Perhaps the California courts will admit the fruits of the search of Knights' residence; we will not." *Ibid.*

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2. Interestingly enough, however, even a search authorized or carried out by *probation* officers might not pass constitutional muster, as interpreted by the Ninth Circuit, if they were merely acting as a "stalking horse" for the police. See, e.g., *United States v. Watts*, 67 F.3d 790, 793-794 (9th Cir. 1995), reviewed on other grounds, 519 U.S. 148 (1997) (per curiam), and *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir. 1988), cert. denied, 488 U.S. 866 (1988).

3. The distinction is only semantic, since a probationer's involvement in criminal activity obviously has a direct and substantial bearing on his effort to achieve rehabilitation.

Understandably, this blunt articulation of, and emphasis upon, the two courts' conflicting Fourth Amendment interpretations is causing considerable consternation and confusion among California law enforcement agencies. On the one hand, they very much want to continue doing what they have been doing for years, i.e., use the efficient and effective tool of conducting warrantless searches of probationers and their property, as sanctioned by the California Supreme Court.[4/] On the other hand, they wonder and worry whether undertaking such searches now and in the future for "criminal investigation" purposes will result in protracted and costly *civil rights litigation*, perhaps even in *personal liability*.[5/]

Just a few years ago, in apparent recognition of the importance of this issue, this Court asked the parties in *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357 (1998) to brief the question of whether "a search of parolee's residence [must] be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole." 522 U.S. 992 (1997). Although the subsequent opinion did not reach this issue, it remains of utmost practical importance to California's more than 90,000 sworn peace officers. As petitioner put it, "[l]aw enforcement officers should not be subject to pressures created by such conflicting legal regimes." (Ptn., p. 21.)

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4. In *People v. Reyes*, 19 Cal.4th 743, 752 (1998), cert. denied, 119 S.Ct. 1507 (1999), the California Supreme Court expressly recognized the value of unannounced, suspicionless searches in reaching the goal of rehabilitation..

5. The relatively recent opinion by the Ninth Circuit in *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (1999) cert. denied, 120 C.Sct. 2717 (2000), disallowing qualified immunity for intentional *Miranda* violations, still looms large in California law enforcement agencies' collective memory.

In sum, there is an immediate and overwhelming practical need for resolution of the deepening conflict between the Ninth Circuit's view and the view of the California Supreme Court. Accordingly, amicus urges this Court to grant the petition for writ of certiorari.

CONCLUSION

For the reasons stated, as well as those set forth in the petition for writ of certiorari, amicus curiae State of California requests that the petition for writ of certiorari be granted.

Dated: February 26, 2001

Respectfully submitted,

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